BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROSALIND SCALES Claimant VS. **SHAWNEE GARDENS NURSING CENTER** Respondent AND **KANSAS HEALTHCARE ASSOC. WC INSURANCE TRUST** Insurance Carrier	)	Docket No. 1,021,953
ROSALIND SCALES Claimant VS. **PRESBYTERIAN MANORS, INC.** Self-Insured Respondent	)	Docket No. 1,021,954

ORDER

Respondent Shawnee Gardens Nursing Center (Shawnee Gardens) and its insurance carrier request review of the August 2, 2005 Preliminary Decision and the August 10, 2005, Nunc Pro Tunc of Preliminary Decision entered by Administrative Law Judge Robert H. Foerschler.

ISSUES

The Administrative Law Judge (ALJ) found that the origin of claimant's injury, the extent of the injury and the treatment needed had not been considered by an appropriate specialist. He referred claimant to Dr. Lynn Ketchum for an independent medical

examination (IME) and ordered that both respondents share equally the expense of the examination and any outside consultations requested by Dr. Ketchum.

Respondent Shawnee Gardens appeals the compensability of claimant's claim against it, arguing the claimant did not give it timely notice of the injury as required by K.S.A. 44-520.

Claimant argues that although she became aware that her injuries were work related when she went to her personal physician, she did not know which employer was responsible for her treatment. Accordingly, claimant claims her failure to notify respondent Shawnee Gardens of her injury within the ten day notice requirement was due to just cause. Furthermore, claimant contends that because she has continued to perform repetitive tasks in her employment with Shawnee Gardens, her series of accidents is ongoing, thereby making her notice timely.

Respondent Presbyterian Manors, Inc., (Presbyterian Manors) states it does not have information to admit or deny whether claimant gave notice of injury to respondent Shawnee Gardens but does not dispute the ALJ's order for an IME as it applies to Docket No. 1,021,954.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant has filed two workers compensation claims which were consolidated for purposes of a preliminary hearing held on July 28, 2005. In her claim against respondent Shawnee Gardens, she claimed injuries from "January 2004 to June 2004 and each and every day worked thereafter."[1] In her claim against respondent Presbyterian Manors, she claimed "[r]epetitive trauma to August 10, 2004 and each and every day worked thereafter."[2]

Claimant began working for Shawnee Gardens in 2003 and during the times in question she was working as a restorative aide. In April of 2003, she also began working at Presbyterian Manors as a certified nurse assistant. Although she started full time at Shawnee Gardens and part-time at Presbyterian Manors, in April 2004 she went to part-time at Shawnee Gardens and on June 6, 2004, she switched to full-time at Presbyterian Manors.

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[1]Form K-WC E-1 filed Mar. 3, 2005, Docket No. 1,021,953.

[2]Form K-WC E-1 filed Feb. 24, 2005, Docket No. 1,021,954.

In late June or July of 2004, claimant began noticing an aching pain in her wrists, up her arm and into her elbow. She went to see her personal physician, who told claimant her problems were work related and advised her to discuss it with her employer. Claimant advised her full-time employer, Presbyterian Manors, of her claim on July 28, 2004. Presbyterian Manors sent claimant to Dr. J. Patrick Walker, who took her off work on August 10, 2004, and sent her to physical therapy for two to three weeks.

In answer to a request from Presbyterian Manors' claims adjuster, Dr. Walker wrote a letter dated August 25, 2004, in which he stated that he felt that 50 percent of the cost of claimant's treatment should be borne by Presbyterian Manors, with the other 50 percent to come from Shawnee Gardens. The claims adjuster wrote claimant the same day advising her that Presbyterian Manors would pay only 50 percent of her medical expenses and temporary total disability. After receiving this communication from Presbyterian Manors' claims adjuster, claimant visited with the administrator of Shawnee Gardens and advised him of her physical complaints. Shawnee Gardens had her fill out an accident report but did not offer to provide her with any medical care.

Claimant has not had any medical treatment since August 2004 and continues to work at both Shawnee Gardens and Presbyterian Manors, although she now works part-time at both.

Respondent Shawnee Gardens argues that claimant's date of accident should be either July 28, 2004, when she first sought treatment from her personal physician, or at the very latest, August 10, 2004, when she was taken off work. Using either date, respondent contends claimant failed to report the accident to Shawnee Gardens within the 10-day period required by K.S.A. 44-520.

Claimant states that she reported the accident to Presbyterian Manors and followed their directives in seeing Dr. Walker and being treated by him. The first time she knew that Presbyterian Manors was contending they owed only 50 percent of her medical expenses and temporary total was when she received the letter from Presbyterian Manors' claims adjuster. She argues she was only doing what she was told to do, and therefore, her failure to notify Shawnee Gardens of her injury before her receipt of the letter from Presbyterian Manors' claims adjuster was due to just cause.

The ALJ's Preliminary Decision does not address the issues of dates of accidents or notice, nor does it order medical treatment for claimant's injuries or payment of temporary total disability. The ALJ merely has ordered that claimant be examined by Dr. Ketchum and that Dr. Ketchum report back to the ALJ his opinion as to the origin and development of claimant's problems and the treatment available to her. The ALJ did order both respondents to share equally the expenses of this examination and any outside

consultations Dr. Ketchum might order. K.S.A. 44-516 authorizes the appointment of a physician to perform an IME in cases where there is a dispute as to the injury.[3]

Respondent Shawnee Gardens argues the ALJ's order is improper because the claim is not compensable. But an order for an IME under K.S.A. 44-516 is not a finding of compensability. The ordered examination is not medical treatment. Thus, it is neither a preliminary award of benefits entered under the preliminary hearing statute, nor is it a final award. The Board has previously held that an order for an independent medical evaluation is an interlocutory order.[4]

Generally, a decision or order is final only when it resolves all issues between the parties and reserves no further question for future action. However, the Board has recognized an exception to this general rule.[5] In *Skahan v. Powell*[6], the Court of Appeals states three criteria whereby an order may be final even if it does not resolve all issues between the parties. The order may be final if it (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment. In our view, however, an order referring a claimant for an IME does not satisfy these three criteria. The order will not conclusively determine the disputed questions of notice, dates of accident, causation or the nature and extent of claimant's disability. Furthermore, it does not even determine the question concerning whether the order for an IME itself or the assessment of costs for the IME are proper because those can be issues at the time of the submission of the case for a final determination by the ALJ in the award and can then be reviewed by the Board on an appeal from that award, if necessary.

The purpose of the ordered examination goes to the merits of the action in that it will address the issue concerning the causation of claimant's injury. That report may also be utilized by the ALJ in determining other issues such as dates of accident and notice, but, as stated, the questions concerning the propriety of the examination and the admissibility of the results of that examination are not reviewable until after the time the final award is issued by the ALJ. The Preliminary Decision, therefore, is interlocutory and not final, and the Board is without jurisdiction to review the ALJ's Preliminary Decision at this time.

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[3] *See also* K.S.A. 44-510e(a) and K.A.R. 51-9-6.

[4] *See, e.g., Scott v. Total Interiors*, No. 244,761, 2000 WL 1134444 (Kan. WCAB July 28, 2000); *Kitchen v. Luce Press Clippings, Inc.*, No. 228,213, 1999 WL 288895 (Kan. WCAB Apr. 2, 1999).

[5] *Rhodeman v. Moore Management*, No. 234,890, 1999 WL 1008029 (Kan. WCAB Oct. 12, 1999).

[6] *Skahan v. Powell,* 8 Kan. App. 2d 204, 206, 653 P.2d 1192 (1982).

WHEREFORE, it is the finding, decision and order of the Board that this appeal from the Preliminary Decision of Administrative Law Judge Robert H. Foerschler dated August 2, 2005, and Nunc Pro Tunc of Preliminary Decision dated August 10, 2005, is dismissed.

IT IS SO ORDERED.

Dated this _____ day of October, 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James E. Martin, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent Shawnee Gardens Nursing Center and its Insurance Carrier
Kathleen Wohlgemuth, Attorney for Self-Insured Respondent Presbyterian Manors, Inc.
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director